Montgomery Ward & Co., Incorporated *and* United Food & Commercial Workers Union, Local 876, AFL-CIO. Case 7-CA-21153

10 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 28 September 1983 Administrative Law Judge James M. Fitzpatrick issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by conducting an investigatory interview of Ilene Poplaskie 13 August 1982[2] in a manner contrary to the principles *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), enunciated. We disagree.

I. FACTUAL BACKGROUND

The credited testimony establishes that 10 August the Respondent began to investigate a shortage in the Customer Accommodation Center of the Respondent's Gratiot Avenue store. Poplaskie was employed in the Customer Accommodation Center. Charles Flanagan, the loss prevention manager of the Gratiot Avenue store, conducted the investigation with the assistance of Greg Porter, the loss prevention manager of the Respondent's Grand River store.

On 13 August Flanagan and Porter interviewed Poplaskie, who reasonably believed that the interview could result in her discipline. Before the interview, Flanagan determined that two union stewards were present in the store. At no time were the stewards asked to participate in the interview.

The interview Flanagan and Porter conducted was a lengthy, sophisticated, and thorough interrogation. During the course of the interview, Poplaskie admitted to certain improprieties, including theft. She signed a statement admitting her guilt and a promissory note agreeing to repay the Respondent $45.

At no time during the interview did Poplaskie request the presence of a union steward or other representative, nor did the Respondent volunteer to provide one. Near the end of the interview, Flanagan picked up the telephone to call the store operator. Poplaskie, thinking he was calling the police, asked, "Am I going to jail, do I need a lawyer?" Flanagan told her she was not going to jail and did not need a lawyer at that time.

At the interview's conclusion, Flanagan called Robert Anderson, who was in charge of the store at the time. Anderson reviewed the statement Poplaskie signed and asked her if it were true. She said it was. Anderson then terminated Poplaskie.

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION

The judge found, initially, that "Poplaskie did not affirmatively request representation as allowed by the *Weingarten* rule." He discredited her testimony that she asked for a "representative" and also found that her question concerning the need for an attorney was insufficient to invoke her *Weingarten* rights.

The judge went on to conclude, however, that the Respondent conducted its interview of Poplaskie in violation of *Weingarten* principles, despite the fact that she never requested representation. The judge's conclusion was based on his finding that the Respondent used interrogation techniques "which easily could have prevented this confused, intimidated, employee from making any affirmative requests for the protection of her legal rights." He found that Poplaskie was "not a paragon of independent, clear, thinking and could easily be influenced by the situation confronting her" and that one of the Respondent's "apparent" motives in conducting the interview as it did was to avoid having a representative present. The judge also emphasized that the Respondent never offered to provide Poplaskie with a representative. Accordingly, he concluded that the Respondent interfered with Poplaskie's Section 7 right "to have mutual aid and assistance" because its "deliberate conduct not only threw doubt on what, if any, intentions Poplaskie entertained respecting representation, but operated effectively to reduce the possibility she would exercise those rights."

III. ANALYSIS AND CONCLUSIONS

A proper analysis of the instant case begins and ends with the fact that Poplaskie never requested

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates refer to 1982 unless otherwise noted.

representation. The Supreme Court specifically stated in its *Weingarten* decision, "The right arises only in situations where the employee requests representation." 420 U.S. at 257. The Board consistently applies this "request" requirement[3] in determining whether a *Weingarten* violation occurred. *Montgomery Ward & Co.*, 254 NLRB 826, 832 (1981); *Appalachian Power Co.*, 253 NLRB 931, 932–933 (1980); *Pick-N-Pay Supermarkets*, 247 NLRB 1136, 1138 (1980); *Greyhound Lines*, 239 NLRB 849, 852 (1978).

The judge attempted to circumvent this prerequisite by relying, essentially, on four findings: (1) the Respondent did not offer to provide Poplaskie with a representative; (2) Poplaskie was frightened and confused; (3) the Respondent conducted an intense and sophisticated interrogation; and (4) an "apparent motive" for the interrogation techniques the Respondent used was to avoid having a union representative present. These findings do not obviate the need for a request.

The fact that the Respondent did not volunteer to provide a representative for Poplaskie is irrelevant. An employer has no obligation under the Act to provide a representative absent a valid request by the employee. *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977).

As for the second finding, the fear and confusion an employee subjected to an investigatory interview may experience is relevant in the *Weingarten* context. It is relevant, however, to the underlying reason that representation is accorded employees in investigatory interviews. Simply stated, employees are accorded requested representation, in large part, because they are frightened and confused. It simply does not follow, however, that the existence of fear and confusion obviates the requirement that the employee request representation before the *Weingarten* protections come into play.

Similarly, the fact that employers often conduct intense, sophisticated, and thorough interviews is another reason that *Weingarten* rights exist. This does not mean, however, that employers somehow violate the Act when they conduct such interviews. Indeed, the Court in *Weingarten* emphasized that the employee right involved "may not interfere with legitimate employer prerogatives." 420 U.S. at 258. It is a legitimate employer prerogative to conduct an intensive investigation into employee theft.

Finally, the finding that the Respondent structured its investigation in such a way that it fulfilled its objective of keeping a union steward out of the interview and, therefore, violated the Act, cannot withstand scrutiny. We find no evidence to indicate that the Respondent, in any way, acted to preclude Poplaskie from requesting representation. The judge's findings to the contrary are conjecture and speculation. Again, employers are perfectly free to conduct investigations of employee misconduct in any manner they please so long as they do not encroach upon the limitations of *Weingarten* or any other restriction the Act imposes. No such encroachments occurred here.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge. This case is about a retail store that discharged a clerk for dishonesty after a lengthy interrogation. The issue is whether the store unlawfully interfered with her right to representation during the interview. I find it did.

This proceeding began with charges filed September 10, 1982,[1] by United Food & Commercial Workers Union, Local 876, AFL-CIO (the Union), against Montgomery Ward & Co., Incorporated (Respondent or Company). A complaint based on the charges issued October 21 alleging that on August 13 Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying employee Ilene Poplaskie the assistance of a union or a legal representative during an interrogation which resulted in her discharge for theft. In its answer Respondent admits the jurisdictional allegations, the identity of management officials involved, the representative status of the Union, and the discharge of Poplaskie. Respondent denies she was interrogated, that she requested representation, or that Respondent's officials continued an interrogation following her request for representation, and also denies generally the commission of unfair labor practices. The case was heard before me at Detroit, Michigan, on April 13, 1983.

Based on the entire record, including my observation of the witnesses and consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a nationwide retailer with its principal place of business in Chicago, Illinois. It operates retail stores throughout the country, including stores in and around Detroit, Michigan (one of these being located at

[3] The Board does not require that the request be in a particular form, so long as it is sufficient to place the employer on notice that representation is desired. See, e.g., *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). This approach does not mean, however, that the protections of *Weingarten* can be invoked without *any* request.

[1] All dates herein are in 1982 unless otherwise indicated.

14455 Gratiot Avenue, Detroit), in which it sells at retail hard and soft goods, and merchandise. During the calendar year 1981, a representative period, Respondent received gross revenues exceeding $500,000 in the operation of its business. It also purchased and caused to be transported to its stores in Michigan goods and materials valued over $500,000, of which those valued over $100,000 were transported to its Michigan stores directly from points outside Michigan. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AND UNION CONTRACTS

The Charging Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive bargaining representative within the meaning of Section 9(a) of the Act for employees of Respondent in an appropriate unit which includes employee Ilene Poplaskie. A local of the International Brotherhood of Teamsters represents certain other employees of Respondent. Both unions maintain collective-bargaining agreements with Respondent. The Teamsters agreement specifically requires that if an employee covered by that agreement requests union representation during a disciplinary interview, the interview shall be suspended until a representative of that union is able to participate. The Charging Union here has no similar written provision in its collective-bargaining agreement but does have an oral agreement with Respondent which is similar to the provision in the Teamsters agreement and has union stewards on duty in Respondent's stores for that purpose, among others.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Poplaskie was discharged on August 13, 1982, having been employed by the Company since September 23, 1977. She had had a high school education and at the time of the hearing herein was 25 years of age. At the time of discharge she worked in the Customer Accommodation Center (CAC) in Respondent's Gratiot Avenue store where she performed a variety of tasks, including handling cash, handling lay-away payments by customers, lost and found property, and other services to customers. When she was hired she was shown, and signed, a copy of the "Company Rules of Personal Conduct" which include the following provisions:

> . . . the following activities are extremely harmful to the success of our store, and anyone involved in them will be immediately dismissed.
>
> . Theft
> . Distruction or misappropriation of property
> . Violation of accepted moral standards
> . Manipulating, altering or falsifying Company records (including employment application)
> . Dishonesty of any kind
> . Abuse of employee discount privilege

In order to control losses through theft by outsiders who come into its stores, as well as by employees working in the stores, Respondent maintains a loss prevention program managed by its loss prevention department. A loss prevention manager is assigned to each store. He in turn is supervised by a district manager in the district headquarters for loss prevention located at another site who supervises the program for all Respondent's stores in the Detroit area. Charles Flanagan is the loss prevention manager at the Gratiot Avenue store.

B. *Prelude to the Interrogation of Poplaskie*

On August 9 there appeared to be a $500 shortage in the cash office of the Customer Accommodation Center at the Gratiot Avenue store. The shortage was reported to Flanagan who began an investigation on August 10 by asking employees in CAC to identify those on duty August 9. Poplaskie, who was acquainted with Flanagan and knew that his job involved investigation of both customer and employee thefts, told him that she, Frances Richardson, and Pat Hasten were on duty in CAC on August 9.[2] It was thus apparent that a cloud of suspicion hung over those three employees. The next day, August 11, Flanagan conducted the first of two interrogations of Richardson in the course of which she implicated Poplaskie in their joint misappropriation of $25 from lost and found property. Apparently Richardson worked the first shift August 11 and Poplaskie the second. They spoke briefly with each other as Richardson was leaving and Poplaskie was arriving. Poplaskie said she had something to tell Richardson, to which Richardson responded with a question as to whether she (Richardson) was fired. In fact Poplaskie had no knowledge on that score and simply told Richardson that the Company was holding back the check of another employee named Thompson. Flanagan, with the assistance of Greg Porter, loss prevention manager at the Grand River store, interrogated Richardson a second time, apparently on August 12, which resulted in her reaffirming her misappropriation with Poplaskie of $25 from the lost and found property, her signing a written statement admitting responsibility for $2100 in losses to the store, and her execution of a promissory note payable to Respondent in that amount. Poplaskie was off work August 12 but during the day her supervisor, Debbie Peltier, telephoned her requesting that she come to work because Richardson had been called to the office, had not returned, and only one employee was left on duty in CAC. Poplaskie, however, was unable to work that day and did not return to the store until the following day, August 13. In the meantime, Flanagan, having with Porter completed the second interrogation of Richardson, conferred with the district loss control manager who instructed him to interrogate Poplaskie with the assistance of Porter. At this point it is obvious, even though Flanagan denied such was the case, that Poplaskie's job was in jeopardy.

C. *The Interrogation of Poplaskie*

About an hour after Poplaskie reported for work on August 13, an employee of the store's personnel office

[2] Pat Hasten is one of two union stewards in the store, the other being Ron Sly.

took her from the CAC area to Flanagan's office in the basement. Flanagan admits that she then reasonably could have expected that adverse action would be taken respecting her employment. According to Porter, she was being interrogated because of a $500 cash pickup missing in CAC and the $25 misappropriated from lost and found property about which Richardson had told them. In accordance with established company policy Flanagan ascertained prior to the meeting that two union stewards, Pat Hasten and Ron Sly, were in the store. Neither was notified about the interrogation and neither participated. It is undisputed that during the interview which followed Poplaskie was not asked whether she wished to have a union steward present. It is company policy that, if an employee being interrogated asks for the participation of a union steward, the interrogation ceases until a steward is in attendance. The interrogation then starts again from the beginning.

What followed in Flanagan's office was an extended interrogation of Poplaskie lasting over 2-3/4 hours. There were no breaks for Poplaskie although Flanagan and Porter took two recesses for themselves. Only Flanagan, Porter, and Poplaskie participated, until near the interrogation's end when the manager in charge of the store was called in. Both Flanagan and Porter are experienced investigators. Flanagan had been loss prevention manager in the Gratiot store for a year and a half, had 6-1/2 years' experience in loss prevention with the Company, and had acquired a Bachelor of Arts degree in criminal justice from Michigan State University. Porter had been loss prevention manager at the Grand River store for 14 months, had spent 3 years with the Detroit Police Department, and had acquired a Bachelor of Arts degree in administration of justice. The "interview" may be appropriately described as a psychological "third degree." It followed an established game plan[3] using predetermined techniques calculated initially to establish a rapport with, and gain the trust of, the subject employee. It included implications of established guilt, use of "loaded questions,"[4] frequent retracing of ground already covered, taking of turns interrogating the employee, leaving the employee on two occasions to think things over, ultimately dictating the substance and form of a confession, and obtaining Poplaskie's promissory note for $45 to cover the "losses" she had caused during her 5 years of employment. After this, Flanagan called in Robert Anderson, at the time the official in charge of the store, who briefly questioned Poplaskie and then fired her.

The "interview" began with Flanagan telling Poplaskie they were going to discuss some company business and she would be paid for her time. He then asked her if she would like the interview on tape. Although she denied she was asked if she wished to have the session taped, she also indicated she did not know what they were talking about which suggests some uncertainty in her mind. Considering this plus the testimony of both Flanagan and Porter that such an inquiry is standard procedure and that in fact she was asked, I find that she was. She said no. Flanagan then began his "presentation" by introducing himself and Porter, who he said was from the district security office. Flanagan asked her if she knew the function of the Company's loss prevention program. She apparently did not, because he then described the duties of loss prevention officers. He detailed their responsibility to protect company assets, including real estate, merchandise, and cash, from losses occurring through the dishonesty of outsiders, customers, and employees. He noted their use of various devices such as bugging equipment and cameras. He asked her if she knew how shoplifters were handled. She agreed she did. He asked her if she was aware of the many ways in which the Company was susceptible to losses. Receiving no response, Flanagan listed various ways, including shoplifting, accidents of employees or customers, and employee mistakes, by which the Company sustains losses. He asked whether she knew of any such losses in her area. She made no response. He noted the possibility of unintentional mistakes, such as when a sale rung up on a register in the wrong department results in an inventory shortage in another department, or when errors occur in shipping or receiving. He gave examples of intentional mistakes which cause losses, including in his list the taking of money from a cash register, ringing up less than the price of an item, undercharging customers, abusing the employee discount privilege, and switching price tags. He asked her to indicate her understanding of the problem. She attempted to respond, saying she may have rung up some sales in the wrong way or accepted payments in the wrong way. He told her he was not referring to unintentional mistakes. He then described the extent of the Company's investigations, strongly implying that they already knew Poplaskie was guilty of dishonesty and wanted her to own up to it. Thus, he stated that there was an ongoing investigation of which she was part and that, "We were here to resolve that problem today in this office." Flanagan and Porter then described their investigative methods as including surveillance of employees and accumulation of information over substantial periods of time to achieve full investigations covering more than one type of loss. Flanagan "told her when an employee causes a loss we do a more or less background investigation on that person and see if they are the type of person that was a good employee or whether they had management problems—should we attempt to resolve the problem with them within the confines of the store, or do we refer it to outside business." This was an obvious suggestion that they might call in the police. He then told her they had conducted an investigation in her department, that they knew of some losses, including some she had caused, and that they were there to resolve the matter in his office at that time. Poplaskie asked him what losses she had caused, but he refused to tell her, demanding instead that, in return for

[3] Comparable methods have been used in other stores of Respondent in the Detroit area. See *Montgomery Ward & Co.*, 254 NLRB 826, 828-830 (1981), enfd. as modified 664 F.2d 1096 (8th Cir. 1983).

[4] Both Flanagan and Porter referred to the "loaded question" which apparently is standard practice in Respondent's loss prevention system. Such a question is "meant to trick or trap: a loaded question." *The American Heritage Dictionary of the English Language*, New College Edition, 1976, p. 765, Houghton Mifflin Co., Boston, Mass. That is how it was used in this interrogation.

resolving the problem within the confines of the store, she would have to be 100 percent honest with him. He told her some employees attempt to deceive him; after they lie to him and the interview is over, there is nothing he can do to help them. She then promised she would be 100 percent honest with him. Flanagan then told her he was going to ask her "a loaded question," which he defined as a question to which he already knew the answer, and that his purpose was to test whether she would be honest with him or would attempt to deceive him. He asked her to tell him the last time she had caused a loss to the Company through means other than an unintentional mistake. According to both Flanagan and Porter, she made no response. Apparently with nothing further being said, Flanagan passed the interrogation to Porter.

According to Poplaskie, the putting of the loaded question following Flanagan's presentation involved somewhat more. She testified that about 30 minutes into the interview, "Well, Mr. Flanagan asked me when was the last time I took money out of the register for my own personal use. I didn't know what they were talking about. So I asked it again. He says, 'Well, when is the last time you took it out for your own use?' I asked again, and he said, 'I am talking about embezzlement, don't you know how serious that is?' I said, 'Hey, wait a minute. There should be somebody else here besides you two, I need somebody else here.'" Counsel asked her whether she indicated who she wished present and she testified, "I asked for representative, somebody else. I said, 'Shouldn't there be somebody else here, a lawyer, a representative, somebody.'" She further testified that Flanagan replied, "Oh, no, it will come up in court." She also testified that she raised the matter of a representative a second time. According to her, "I said shouldn't there be somebody else here besides you two." She recalled that Flanagan replied, "No, no, it would all come up in court." But she did not recall, even approximately, when this occurred during the session, or how much time elapsed between the first and the second occurrence, or whether it was toward the end, or whether she mentioned an attorney or representative at that time. Both Flanagan and Porter denied that the word embezzlement was used during the long interrogation. Flanagan specifically denied that Poplaskie, either by question or statement, raised the issue of whether someone else should be there besides the two investigators, or that an attorney or representative or union steward should be there. He also denied saying, "It will come up in court." Porter denied that she asked if someone else should be there, that she said anything of that nature, that the word representative was mentioned during the interview, and that she asked for a union steward or for an attorney. It is undisputed that at the end of the entire interrogation she asked if she would need a lawyer. But as to whether, during the body of the interrogation, she asked for a union steward or generally for a representative or an attorney, I find she did not, crediting the testimony of Flanagan and Porter. They corroborate each other. They each gave a clear-cut, orderly, account of the sequence of the interview, while Poplaskie generalized more, was often unable to identify whether it was Flanagan or Porter who had asked or stated something to her, and repeatedly was unable to recall with particularity what occurred. All in all she seems the least reliable witness of the three who were present.

According to Porter, "After Mr. Flanagan had asked her the loaded question and she didn't respond, that is when I took over the interview." Porter in essence repeated the presentation Flanagan made, describing the function of the loss prevention program, the methods of investigation, and the need to resolve questions raised. He told her this particular investigation had been ongoing for several months and that they had no doubt in their minds she was involved in some losses, and that her involvement was the main reason for the interview. She said nothing. So Porter put the loaded question to her, "When was the last time that you did something that would cause a loss to the Company?" According to Porter, Poplaskie answered, "I don't know what you're talking about." He then explained in detail how an employee in CAC could cause losses to the Company. He asked her about refunds. He referred to cash pickups, to money in the cash registers, to voids, and to the layaway refunds. She still did not respond. The two interrogators then told her to think about it and they left her alone in the room for about 15 minutes, leaving the door slightly ajar.

When they returned, Flanagan asked her whether she had thought about some of the losses she had caused. She said no. Flanagan described again their methods of gathering information. He said that many times they gather information from other employees and she should think about that. Porter told her she was not the only employee involved in the investigation nor was she the first nor the last that they would talk to. After several minutes of silence she inquired if they were talking about Frances Richardson. Flanagan said that was part but not all of it, and asked her if she wanted to tell him about herself and Frances. She then told them about the incident a few weeks earlier in which she and Richardson, while going over lost and found items together in the CAC area, discovered a wallet containing $25 in cash which they divided between themselves by making change in the cash register. This, of course, confirmed the information they already had from Richardson.

Flanagan continued by indicating, according to Porter, that Poplaskie was responsible for other losses. He asked her to think back further. She replied she could not remember any other losses she caused. He then repeated the various ways in which she could have caused losses. He asked about refunds. She said she could not remember. He asked about cash from the register. She replied she had taken cash in the past but could not remember the dates and amounts and she asked him for information as to dates and amounts. But Flanagan refused, saying the purpose of the interview was for her to tell them what she had done, not the reverse. She said again that she could not remember. In this manner Flanagan asked about each possible type of loss. To most of these queries she responded that she could not remember. To some, however, according to Flanagan, she gave specific responses. Thus, when asked whether she had removed merchandise from the store, she said no. When asked if

there was anything else in the CAC area that she could have caused a loss with, she replied that when she first became an employee she did not pay for gift wrapping, that no one did.[5] On several occasions she asked for time to think and her interrogators simply waited. After one of these pauses she mentioned that she had violated the employee discount privilege by purchasing a radio for her brother on one occasion and on another occasion some insulation for a brother-in-law while they were not living in the same household as she, and that when she left home she left her discount card with her mother but she did not know if her mother used it.[6]

Finally, after Poplaskie repeatedly had indicated her inability to recall and her need for time to think, Flanagan gave her a sheet of paper down the center of which he had drawn a line. He wrote "cash" on the left side and "discounts-gift wrap etc." on the right. He told Poplaskie to sit down and think about it and if she thought of anything to write it down on the paper. He and Porter again left the room for 10 to 15 minutes. On their return the paper was still blank. Flanagan asked her why she had written nothing on it. She replied that she could not remember anything. He then instructed her to write down the things she already had told them. She then wrote on the right side the following:

> Parents had disc card for about a year. I wasn't living at home. First 2 years I was here I didn't pay for gift wrap. Got radio with disc for brother that didn't live with.

On the left side of the paper under cash she made no entry at all. Subsequently, Flanagan wrote below Poplaskie's writing the figures 15, 17.50, and 12.50, which, respectively, were the discount for the radio for her brother, the discount for the insulation for her brother-in-law, and half of the money she and Richardson had taken from lost and found. He entered the total of $45.

Flanagan then again asked her about taking cash from the registers or from the cash office or from cash pickups. She gave no response but asked for some dates and amounts. Flanagan again said they could not do that, that she must remember herself. Poplaskie indicated she needed time to think. They all sat for a time and then the interrogators again asked her if she had thought of anything and she answered no, that she was still trying to think. They continued to press her by asking her again about certain types of losses. She admitted generally having caused some losses but could not recall dates and amounts. Flanagan's testimony is to the effect that she admitted probably having caused losses other than those she had detailed and probably having stolen cash out of the cash office but that she could not remember. Porter's account indicates that she admitted having caused losses but could not recall dates or amounts. Her own testimony indicates that she felt pressured in that she felt she had to tell them something, but she could not remember so she kept asking for more time to think, hoping she could satisfy her interrogators. I credit her account.

Porter finally decided to end the interrogation and to memorialize in a statement what she had already admitted. Before taking the statement Porter told her they would have to have a written statement acknowledging the things they had discussed. She asked the purpose of the written statement and he replied that they needed something to review with management so there would not be hearsay. According to Flanagan, Porter said the statement was for the use of upper management to decide whether or not to prosecute her. Poplaskie felt if she did not comply she would go to jail. Porter supplied her with pencil and paper and told her item by item the substance of what to write and the form in which to write it. He did not dictate the body of it verbatim. She wrote it out following his instructions over a period of 20 minutes and then signed each of the two pages. Flanagan and Porter signed as witnesses. The text of the statement is as follows:

> My name is Ilene Poplaskie, I am employed at Montgomery Ward's, since Sept. of '78. During my employment I've cost the company losses of approximately ($45.00) forty-five dollars. I did this by stealing ($25.00) twenty-five dollars out of lost & found and splitting it with Frances Richardson. I did this last month on a Sunday. I've allowed family members not living with me, or not immediate family to make purchases using my discount card. Once was for some installation [sic] for my brother-in-law. My parents may have used my discount card while I wasn't living there. I've realized what I've done is wrong & I could be prosecuted or terminated. Everything I've written is true. No threats or promises were made on me to write this. I am sorry for what I've done. I can't recall taking any cash from the register. I'd like to pay the company back the ($45.00) forty-five dollars.

The $45 figure in the statement was arrived at by adding up the estimated value of the discount privilege violations and half of the $25 taken from lost and found. After Poplaskie completed the statement, Flanagan filled out a form of a promissory note from her to the Company in the amount of $45. He asked her to sign it and she did.

Poplaskie testified that she felt pressured during the interrogation. Unquestionably, considerable pressure was put on her by her interrogators. Near the beginning of the meeting Flanagan asked Poplaskie what her future plans were. She replied that she enjoyed working at the store and would like to continue. According to her, he then commented, "If you are worried about your job, you might as well forget it, it is gone." I credit her testimony on this. Although Flanagan denied he made such a remark, I do not credit his denial. Richardson had already implicated Poplaskie and, in view of that knowledge, even though the interrogation of Poplaskie was not completed, her job was in jeopardy. Flanagan's statement was not unrealistic in the circumstances. In so finding, I

[5] Flanagan asserts that everyone pays for gift wrap, but he did not specifically refer to the period of her early employment.

[6] Poplaskie testified that as a store employee of several years she was well known to other clerks and when she purchased an item she automatically was given the discount without having to display her discount card.

do not conclude that her fate was at that point irrevocably sealed. For one thing, Flanagan and Porter carried on with their extensive interrogation of Poplaskie. Neither had authority to decide her future with the Company. And she was finally fired by another official, who was in charge of the store, only after he reviewed the results of the interrogation and asked her a question. Nevertheless, even though Flanagan's remark was an opinion and not a decision, it put added pressure on her because the logical inference was that the consequences of the interrogation were much more serious than mere loss of her job.

Poplaskie also testified credibly that after her interrogators took their second recess and returned to find she had written nothing on the sheet of paper on which she was to list intentional losses she had caused, one of them stated that she would not cooperate and they were going "to call," not indicating who they were going to call. She thought they meant the police, in part because of Porter's remark that, "We don't know where you're going to be tonight," implying Poplaskie might spend the night in jail. Flanagan denied saying, "If you won't cooperate we will have to call." Porter denied saying that he did not know where she would be that night. He did admit that "tonight" was mentioned in connection with Poplaskie's trouble in remembering, and that Poplaskie suggested that she go home for the night to think about matters and call them later, that she possibly might be able to give them more information. According to Porter, they told her that would be too late, that the time to think about it was now. In this context she reasonably concluded that she was threatened with going to jail. The validity of this conclusion is supported by their emphasis on the importance of resolving matters within the store rather than outside, by Porter's admission that an outside resolution could mean prosecution, and by the fact that at the end of the interrogation Poplaskie asked Flanagan if she was going to jail and if she would need a lawyer. In view of this I do not credit the above denials of Flanagan and Porter and do credit the substance of Poplaskie's account that they led her to believe that she might spend the night in jail if she did not cooperate.

Poplaskie also testified that Porter and Flanagan also asked her how her family and her boy friend would feel. Flanagan denied asking her how her family would feel and Porter denied asking her how her boy friend would feel. But she testified in a credible manner about this, and considering that such questions would be logical in the circumstances, I credit her account. She also testified credibly that near the end of the interrogation they told her, "Well, just like Frances [Richardson] you can walk right out of here; we know what you did. She told us and just like her you can do it too." Although Flanagan denied that he said this, such a comment fits with the generally heavy emphasis by both interrogators on resolution of problems within the confines of the store. In the circumstances I credit Poplaskie's account. She twice testified that on one occasion Flanagan asked her if she would like to take a lie detector test, that she was confused and could not believe what was happening and therefore gave no response, and that he then said, "Well, if you think this is bad, the lie detector would be worse." She further testified, "Well, they started laughing between each other because everything would come up on the lie detector test." I credit her detailed account. During the interview she repeatedly pleaded inability to remember and the suggestion that she take a lie detector test would be logical in those circumstances. Although Flanagan denied he mentioned lie detector, his denial was general. Porter was not asked about it at all.

D. *The Discharge*

After the interrogators obtained Poplaskie's written statement and her promissory note, Flanagan picked up the telephone intending to call the store operator. As he did so, Poplaskie, thinking that he was calling the police, asked apprehensively, "Am I going to jail, do I need a lawyer?" He replied that she was not going to jail and did not need a lawyer at that time. He then called the telephone operator, requesting that the "staff member" on duty, who would be the only person in the store with authority to discharge an employee, be called down to his office. In about 5 minutes Robert Anderson, manager of the Auto Center in the store and the staff member in charge of the store at that time, appeared. Flanagan showed Anderson Poplaskie's statement, which Anderson read. Anderson turned to Poplaskie and asked her if it was true. She indicated it was.[7] Anderson told her he would have to terminate her at that time. He then left.

After Anderson left Flanagan asked her, "Do you feel you were treated fairly?" She replied, "Probably so." He also asked her not to speak to anybody in the CAC area because his investigation had not been concluded respecting the loss of the $500 pickup. He admitted in his testimony that this admonition included that she not talk with union steward Pat Hasten (who worked in the CAC area). Poplaskie agreed she would remain silent. Poplaskie testified, "Then I asked Mr. Flanagan what happens from here or what happens to me. He said well he's going to have to send this [presumably her confession] into District and if they are going to prosecute me he will let me know. Otherwise, he doesn't want to see my ass any more, or, pardon me, maybe talk to my ass. I don't recall." I credit her in this respect. Flanagan only denied using the word "ass" and did not recall whether he said he did not want to see her or hear of her again. Flanagan then called a guard to escort Poplaskie while she picked up her belongings and left the store. The "interview" had lasted over 2-3/4 hours.

E. *Discussion on the Right to an Attorney*

The General Counsel contends that, even if she did not earlier ask for a representative, Poplaskie triggered her *Weingarten*[8] rights when Flanagan reached for the telephone near the end of the session and she asked if she was going to jail and if she would need an attorney. For Poplaskie the interrogation was not over because Anderson, who had the authority to discharge her, thereafter

[7] I base this finding on the credited testimony of Anderson, Porter, and Flanagan. Poplaskie testified that when Anderson asked her if the statement was true, she looked at Flanagan and said, "He says it's true."

[8] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

came in, continued the investigation by reading her statement, questioning her as to whether it was true, and, finally, on the basis of her answer together with her statement, decided to discharge her. See *Coyne Cylinder Co.*, 251 NLRB 1503 (1980). Counsel argues that because an employee need only seek *Weingarten* representation in general terms in order to invoke that right (*Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977)), and because the request may be in question form and still be effective (*Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980)), and because the right to representation includes the right not only to have union agents but also fellow employees or witnesses (*Illinois Bell Telephone Co.*, supra; *Anchortank, Inc.*, 239 NLRB 430 (1978); *Glomac Plastics*, 234 NLRB 1309 (1978); *Ohio Masonic Home*, 251 NLRB 606 (1980)), the right should be extended to include a request for a lawyer. The basic difficulty with this contention is that, as pointed out by the Supreme Court in *Weingarten*, the right to representation is based on the employee statutory right under Section 7 of the Act to engage in concerted activities with other employees.[9] Exercise of such a right does not appear to extend to an outside professional such as a lawyer uninvolved in the employer-employee relationship. As noted in the General Counsel's brief, no Board ruling indicates that the *Weingarten* right extends to a request for a lawyer. There is, on the other hand, some authority indicating the contrary. In *Consolidated Casinos Corp.*, 266 NLRB 988 (1983), Administrative Law Judge Clifford Anderson, at 1008, held that the *Weingarten* right did not extend to a request for an attorney. The Board adopted his decision without comment on this point, but did so with the reservation that its adoption was made in the absence of exceptions by the respondent and should not be construed as an endorsement of all of the judge's findings and conclusions. In agreement with Judge Anderson, I conclude here that when Poplaskie asked Flanagan if she needed a lawyer, she did not thereby make a request within the meaning of the *Weingarten* rule.

F. *Discussion on the Need for an Appropriate Request for Representation*

The situation here poses the question whether, even though Poplaskie did not affirmatively request representation as allowed by the *Weingarten* rule, she effectively was denied that opportunity by Respondent's agents. Thus, the so-called interview, carried on by two professional investigators pursuant to a preestablished scenario, using techniques which took advantage of the unrepresented employee's psychological vulnerability, was an intimidating and an entrapping situation for the unaccompanied employee. And the record here leaves no doubt that it was intended to be such.[10] Such methods necessarily diminish the possibility that an employee will take advantage of the rights afforded by the Act. The most obvious reason for management using such methods is its legitimate need to control and to counteract in-house dishonesty among its employees. Another, perhaps secondary, apparent motive is to avoid, if possible, triggering the *Weingarten* right, so that the investigation may be carried out unhampered by the presence of anyone who might counsel the subject employee. Porter denied that their methods were designed to circumvent *Weingarten*, but there can be no doubt, based on the circumstances described by him and by Flanagan, that their procedures avoid the involvement of a representative unless the employee affirmatively demands one. Thus, although Flanagan made sure two union stewards were in the store, neither he nor Porter mentioned that to Poplaskie nor asked her if she wished either to be present. In testifying about the company policy to stop the interview if the employee requests a union steward, they both described the employee's right in limited terms, that is, to have a "steward" present, not mentioning any other type of union representation or other employee participation pursuant to the Section 7 rights to engage in concerted activities.[11] Many of their methods would likely have been less effective if another person had been present. These include the technique of taking turns interrogating the subject, the re-plowing of ground already covered in the interrogation, the long duration of the session, the interrogators twice taking recesses while leaving the employee isolated to think things over, and, at least in the employee's mind, keeping her under restraint.[12] Of course an employee in an investigatory interview is not required to have a representative if the employee does not wish one. The employee's desire in this regard is usually indicated by whether a request for a representative is, or is not, made. Here Poplaskie did not request a representative during the body of the interrogation. But her confusion and the pressure exerted on her during the lengthy interrogation may well have prevented her from affirmatively expressing her desire if in fact she wished representation. In such circumstances, silence, as a measure of the employee's wishes regarding representation, is suspect. This employer's methods robbed silence of significance in assessing Poplaskie's wishes to have, or not to have, representation, and, in fact, threw additional doubt on what those wishes were. To avoid deliberate undercutting of *Weingarten* by using methods which diminished the employee's ability and opportunity to exercise those rights, Respondent could easily have clarified what her wishes were. Neither Flanagan nor Porter asked her if she wished to have a union steward present. Porter testified that he believed she knew she had the right to a union steward because she was a longtime employee and he thought that the Union had informed employees generally that they had such a right. But even if that were so, and I assume it was, it was also true that Poplaskie, as was apparent from her testimony and demeanor at the hearing, was not a paragon of independent, clear, thinking and could easily be influenced by the situation con-

[9] *Weingarten*, supra at 256–257.

[10] As already noted, such methods are in use in Respondent's stores in the area. See *Montgomery Ward & Co.*, supra (254 NLRB 826, 828–830).

[11] There is no evidence here of a waiver of any of these rights.

[12] Poplaskie credibly testified that she felt she was under restraint and the circumstances support that belief. This is so even though there was a telephone in the room, which she did not think to use, and even though during the two recesses, when the interrogators left her alone, the door was left ajar.

fronting her. The evidence relating to the interview indicates she was in fact both confused and intimidated.

Weingarten rights ordinarily are triggered upon the request of the affected employee. In determining what sort of requests trigger these rights, the Board applies a broad standard. They have been triggered by an employee asking if he needed a witness, *Bodolay Packaging Machinery*, 263 NLRB 320 (1982); by an employee saying he would not sign a statement unless he had a union representative present, *Southern Bell Telephone Co.*, 251 NLRB 1194 (1980); and by an employee's request for his "lawyer," where "lawyer" was an idiomatic reference to a union steward, *General Motors Corp.*, 251 NLRB 850 (1980). In the present case, no form of triggering request was made. It is clear, however, that the security personnel used techniques which easily could have prevented this confused, intimidated employee from making any affirmative request for the protection of her legal rights. It would honor form over substance to differentiate techniques which prevent such a request from a direct, verbal denial of the employee's rights. As the Board noted in *Anchortank, Inc.*, supra at 431, "the Court's primary concern [in *Weingarten*] was with the right of employees to have some measure of protection when faced with a confrontation with the employer which might result in an adverse action against the employee." The Supreme Court did not specifically state that employees do not have the right, under certain circumstances, to be affirmatively informed of the right to *Weingarten* protections. After noting that, "[s]econd, the right [to representation] arises only in situations where the employee requests representation," the Court stated, "[i]n other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Weingarten*, supra at 257. The qualifying statement indicates that, in an effort to protect "fearful and inarticulate" employees, the Court deems that employees lose their *Weingarten* protections only when they deliberately forego their "guaranteed right" to those protections. I do not understand the Court holding to be that the right to representation does not exist until an affirmative request is made. The right is founded on the employee's statutory right under Section 7 of the Act to engage in concerted activities. The Court is indicating that the employee has an option to use or not to use that guaranteed right. It would be an affront to that ruling to allow employers to impinge on that election by means of investigative techniques.

The Court further noted that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" Id. at 262. In a situation such as the present one, where the interrogation techniques used by the Company's trained security personnel so exacerbated that imbalance as to affect the employee's continued attendance without representation, the employer should at least determine that the employee has affirmatively decided to forego her guaranteed right to that representation. In reaching this conclusion, I note the Board's interest in broadly defining the "triggering request" of *Weingarten*; the Court's concern that the "inequality the Act was designed to eliminate" not be perpetuated; and the Board's statement, in extending *Weingarten* protections to include the right to pre-interview consultations between the affected employee and his representative, that "[p]erhaps all we are really suggesting is that knowledge is a better basis than ignorance for the successful carrying on of labor-management relations." *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977).

There, of course, would be no question but that Respondent would have adequate grounds for discharging Poplaskie if her *Weingarten* rights were not involved. Her merit, or lack of merit, as an employee, however, is immaterial to a consideration of the issue of whether her *Weingarten* rights were infringed. Dishonest, as well as honest, employees are guaranteed those rights. Also, nothing in this decision should be construed as a finding that Respondent's investigative methods were inappropriate for purely security purposes. Whether or not they were is not at issue here. What is pertinent and crucial is that Respondent's deliberate conduct not only threw doubt on what, if any, intentions Poplaskie entertained respecting representation, but operated effectively to reduce the possibility she would exercise those rights. Accordingly, I find Respondent interfered with her rights, guaranteed by Section 7 of the Act, to have mutual help and assistance from fellow employees.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Ilene Poplaskie on August 13, 1983, as a result of an interrogation during which she reasonably could expect her employment to be adversely affected, and in which Respondent's security officials interfered with her exercise of her right to have a union steward present, Respondent threatened, coerced, and restrained her in the exercise of rights guaranteed by Section 7 of the Act and thereby committed unfair labor practices prohibited by Section 8(a)(1) of the Act.

4. Those unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

By way of remedy the General Counsel seeks, among other things, reinstatement of Poplaskie to her former position along with backpay. Reinstatement, however, is not appropriate in these circumstances because in the course of the hearing herein Poplaskie admitted that she and Frances Richardson together had misappropriated $25 from Respondent's lost and found property as well as violations of company rules governing her employee

discount privilege with respect to purchases of insulation for her brother-in-law and a radio for her brother. In these circumstances, and considering that Respondent has not shown that its decision to discharge Poplaskie was not based on information obtained in what I have found to be an unlawful interview, the appropriate remedy does not include her reinstatement but does require that she be made whole for any loss of earnings between her discharge on August 13, 1982, and the hearing herein on April 13, 1983, when she admitted the above-noted derelictions. See *Montgomery Ward & Co.*, 254 NLRB 826 (1981). Although the Circuit Court of Appeals for the Eighth Circuit not only denied reinstatement but also refused to order backpay for the employee involved in that case[13] and the Board appears to have accepted the Court of Appeals decision for that case, the Board has since referred with approval to its own holding respecting remedy in the underlying case. See *Hillside Avenue Pharmacy*, 265 NLRB 1613 (1982). It is also appropriate that Respondent be ordered to expunge and physically remove from its records and files any reference to the unlawful interview with Ilene Poplaskie. Backpay for Poplaskie shall be computed with interest thereon in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[14]

[Recommended Order omitted from publication.]

[13] *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981).
[14] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).